

Internal Revenue Service

Number: **202024004**

Release Date: 6/12/2020

Index Number: 9100.00-00

Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:ITA:B02

PLR-121295-19

Date:

February 27, 2020

LEGEND:

Taxpayers =
Year 1 =
Year 2 =
Year 3 =
Accountant =
X =
Date 1 =
Date 2 =
Date 3 =
Year 4 =

Dear :

This is in response to a letter sent by your authorized representatives dated September 9, 2019, as supplemented by additional correspondence dated October 28, 2019, December 13, 2019, and January 24, 2020. In that letter, you requested an extension of time to make an election under § 163(d)(4)(B)(iii) of the Internal Revenue Code to take net capital gain from the disposition of property held for investment into account as investment income under §§ 163(d)(1) and 163(d)(4)(B) for Year 1, Year 2, and Year 3. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations.

FACTS

Taxpayers represent that the facts are as follows:

For Year 1, Year 2, and Year 3, Taxpayers timely filed a joint Form 1040, Individual Income Tax Return. The return was prepared by Accountant, a certified public accountant, who is currently with the accounting firm X.

Taxpayers' Year 1 return was filed on Date 1, Taxpayers' Year 2 return was filed on Date 2, and Taxpayers' Year 3 return was filed on Date 3. Through inadvertence and mistake, Taxpayers failed to make a timely election under § 163(d)(4)(B)(iii).

In preparing the Taxpayers' Year 4 return, Taxpayers learned of their ability to elect to use their investment interest expenses in Year 1, Year 2, and Year 3 to offset their investment income and reduce their tax liability in Year 1, Year 2, and Year 3.

LAW

Section 163(d)(1) provides that, in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest shall not exceed the net investment income of the taxpayer for the taxable year. Investment interest expense that is disallowed by § 163(d)(1) may be carried to the next taxable year. Section 163(d)(2).

Section 163(d)(4)(B) provides, in part, that investment income is the sum of --

(i) gross income from property held for investment (other than gain taken into account under clause (ii)(I)),

(ii) the excess (if any) of --

(I) the net gain attributable to the disposition of property held for investment, over

(II) the net capital gain determined by only taking into account gains and losses from dispositions of property held for investment, plus

(iii) so much of the net capital gain referred to in clause (ii)(I) as the taxpayer elects to take into account under this clause.

Section 1.163(d)-1(b) of the Income Tax Regulations provides that the election under § 163(d)(4)(B)(iii) must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized. The net capital gain taken into account as investment income under this election is not eligible to be taxed at capital gain rates.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling,

procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad) under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides extensions of time to make a regulatory election under Code sections other than those for which § 301.9100-2 expressly permits automatic extensions. Requests for extensions of time for regulatory elections will be granted when the taxpayer provides evidence (including affidavits described in the regulations) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1) states that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or
- (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make the election.

Under § 301.9100-3(b)(3), a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

- (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested;
- (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief.

If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

Section 301.9100-3(c)(1)(ii) provides, in part, that the interests of the government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made, or any taxable years that would have been affected by the election had it been timely made, are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief.

Section 6501(a) provides, in part, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

ANALYSIS

Taxpayer's election is a regulatory election, as defined under § 301.9100-1(b), because the due date of the election is prescribed in § 1.163(d)-1(b). As such, the Commissioner has the authority under §§ 301.9100-1 and 301.9100-3 to grant an extension of time to file a late regulatory election.

Taxpayer in this case has represented that under §§ 301.9100-3(b)(1)(i) and (v), it requested relief before the failure to make the regulatory election was discovered by the Service and that it reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise Taxpayer to make, the election. As such, Taxpayer acted reasonably and in good faith. Taxpayer has also represented that none of the circumstances listed in § 301.9100-3(b)(3) apply with respect to its request for relief.

However, for Year 1 and Year 2, pursuant to § 301.9100-3(c)(1)(ii), the interests of the Government will be prejudiced because a letter ruling granting relief would necessarily need to be issued after the statute of limitations has closed for the Year 1 and Year 2 taxable years in which Taxpayer is requesting to make the late election at issue. Therefore, the Service cannot grant Taxpayer's request for relief under §§ 301.9100-1 through 301.9100-3 for Year 1 and Year 2. For Year 3, the interests of the Government

will not be prejudiced because the letter ruling granting relief will be issued before the statute of limitations for Year 3 is closed.

CONCLUSION

Under the facts as represented by Taxpayer, the requirements of §§ 301.9100-1 and 301.9100-3(b)(1) for a late election for Year 3 have been satisfied. The information and representations made by Taxpayer establish that Taxpayer acted reasonably and in good faith and that granting an extension of time to file the election will not prejudice the interests of the government under § 301.9100-3(c)(1). Furthermore, Taxpayer has represented that the Year 3 taxable year in which the regulatory election should have been made and any taxable years that would have been affected had it been timely made, are not closed by the period of limitations on assessment. Accordingly, Taxpayer is granted an extension of time until 60 days following the date of this ruling to file an amended return for the Year 3 taxable year ending Date 3 under § 1.163(d)-1(b). The amended return must include an election statement stating that Taxpayer is electing the safe harbor to take net capital gain from the disposition of property held for investment into account as investment income under §§ 163(d)(1) and 163(d)(4)(B).

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings; it is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that this ruling may not be used or cited as precedent.

A copy of this ruling must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter to the appropriate operating division director. Enclosed is a copy of the letter ruling showing the deletions proposed to be made in the letter when it is disclosed under § 6110.

Sincerely,

David B. Silber
Acting Senior Technician Reviewer, Branch 2
Office of Associate Chief Counsel
(Income Tax & Accounting)

cc: